BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GENNIEVE RUTH ANN HOUSE	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 189,199 & 222,498
DEPT. OF SOCIAL & REHABILITATION SERVICES	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Bruce E. Moore on January 6, 2000. The Appeals Board heard oral argument June 14, 2000.

APPEARANCES

Garry L. Howard of Wichita, Kansas, appeared on behalf of claimant. Richard L. Friedeman of Great Bend, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This appeal involves two claims consolidated for trial. Docket No. 189,199 concerns an injury to claimant's low back alleged to have occurred on December 29, 1992, when she slipped and fell on ice. In Docket No. 222,498, claimant alleges she injured her low back when her chair slipped out from under her and the alleged date of accident is February 11, 1997.

In the first claim, Docket No. 189,199, the ALJ awarded benefits for a 3 percent disability based on functional impairment. He denied work disability because claimant returned to work at a comparable wage. Claimant asks that this award be affirmed. Respondent contends claimant suffered no permanent impairment and asks that benefits be denied. Nature and extent of the injury is the only issue on appeal.

In the second claim, Docket No. 222,498, the ALJ found claimant is entitled to benefits based on a 17.5 percent work disability. The work disability was calculated based on a 3 percent task loss and a 38 percent wage loss for 20.5 percent work disability less the preexisting 3 percent disability. On appeal, claimant contends the work disability should be increased. According to claimant, the work disability award fails to properly account for the fact claimant is limited to working five hours per day. Respondent, on the other hand, contends claimant has again failed to prove she sustained any permanent injury and benefits should be denied on this claim as well. The nature and extent of claimant's injury is also the only issue on this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Awards in both Docket No. 189,199 and Docket No. 222,498 should be affirmed.

Findings of Fact

1. Claimant worked with families in their home in crisis situations to maintain the residence of the children with their parents in the home. On December 29, 1992, while calling on a client, claimant slipped and fell, landing on her back.

2. After seeing several other physicians, claimant was eventually referred to Dr. Mary A. Lynch for treatment. Dr. Lynch first saw claimant February 17, 1994. Dr. Lynch diagnosed SI joint synovitis with a piriformis syndrome and posterior tibialis tendinitis. She ultimately rated the resulting impairment as 3 percent of the whole person. Dr. Lynch is the only physician to give an opinion to the extent of impairment from the December 29, 1992 injury.

3. After the 1992 injury, claimant returned to work at the same job she was doing before the injury and no claim is made for a work disability.

4. On February 11, 1997, claimant's chair shot out from underneath her and she landed on the floor. Claimant already had an appointment scheduled with Dr. Lynch the next day and she reported the injury to Dr. Lynch at that time. Dr. Lynch provided some treatment and claimant was referred first to Dr. Terrance C. Tisdale and then Dr. William D. Kossow.

5. Dr. Kossow first saw claimant July 10, 1997. Dr. Kossow's July 10, 1997 letter to Dr. Tisdale, the referring physician, contains a history of both the 1992 and the 1997 accidents. The report mentions an MRI done in June 1997. The MRI revealed no disc abnormality and only age-related degenerative changes. It was Dr. Kossow's impression at that time that claimant suffered from chronic low back pain with a recent exacerbation after her fall, lumbosacral strain with myofascial pain component, degenerative joint disease of the lumbosacral spine, fibromyalgia syndrome, and depression. Dr. Kossow eventually dropped the fibromyalgia diagnosis, concluding claimant did not meet the diagnostic criteria. Dr. Kossow recommended claimant limit her work, as she was already doing, to two hours in the morning and one and one-half hours in the afternoon until July 21, 1997, and then two hours in the morning and two hours in the afternoon.

6. Dr. Kossow placed permanent restrictions on November 24, 1997. The permanent restrictions, as stated in Dr. Kossow's letter to the State Self-Insurance Fund, were as follows:

> The patient has final restrictions of working up to 5 hours a day, up to 2 ½ hours in the morning, 2 ½ hours in the afternoon with the same restrictions I gave her before which include not lifting over 20 lb. and no repetitive bending of the back. She should change positions every 30 minutes.

The same letter of November 24, 1997, states that Dr. Kossow planned to order an FCE to objectively determine the patient's final restrictions and would generate a final return to work prescription after the FCE was done.

7. The FCE was done December 9, 1997. The report indicated claimant was self-limiting due to pain complaints. After the FCE, Dr. Kossow retained the same restrictions. He is questioned extensively about this in his deposition and he acknowledges that based on objective criteria claimant should be able to do sedentary work eight hours per day. He nevertheless retained the five-hour per day limit based on his own evaluations. He testified that he gradually increased, he described it as titrating, the number of hours claimant worked and found she tolerated work up to five hours per day and then had complaints suggesting she should not work more. He also rated claimant's impairment as 5 percent of the whole person. Dr. Kossow did not believe claimant was a malingerer.

8. Dr. Kossow also referred claimant to Dr. George S. Jerkovich, a psychiatrist, for evaluation and treatment of depression. Dr. Jerkovich had treated claimant, at least in part for depression, beginning in 1990, before either of the two accidents involved in this appeal. His records show that claimant had been hospitalized for depression in 1988 and records from 1991 indicate she wanted to commit suicide.

Dr. Jerkovich saw claimant October 30, 1997, after the referral by Dr. Kossow. Dr. Jerkovich testified claimant has a history of chronic depression. Dr. Jerkovich testified

that he thought the accident may have been a factor in causing claimant's depression to return. Dr. Jerkovich did not believe the aggravation would be permanent.

9. Gregg R. Root, a physical therapist, testified to the FCE he did in 1997 and to physical therapy he did for claimant in 1993 and 1994. Mr. Root testified that from testing done November 29, 1993, claimant was positive for three of five Waddell signs for symptom magnification. On January 27, 1994, she was again positive on three of five Waddell signs. At the time of the FCE in 1997, claimant was positive on all five of the Waddell signs.

10. On March 2, 1998, at the request of the State Self-Insurance Fund, claimant was examined by Dr. Deborah T. Mowery. Dr. Mowery testified that claimant was tearful throughout the examination and that her movement patterns improved with distraction. Dr. Mowery considered her gait to be atypical for any organic problem. Claimant seemed to flip from side to side. Dr. Mowery noted claimant leaving the building and testified claimant's movements improved. Dr. Mowery found all five of the Waddell signs to be positive. Claimant winced to light palpation. Claimant's straight leg raising was not consistent when the sitting and supine leg raising were compared. Claimant exhibited give-away weakness.

In summary, Dr. Mowery did not believe claimant had any physical problems or permanent impairment from a work-related injury. Dr. Mowery considered the etiology of claimant's pain to be psychiatric.

11. Claimant was examined by Dr. Peter V. Bieri at the request of claimant's counsel. Dr. Bieri saw claimant on January 9, 1998. Dr. Bieri concluded claimant met the criteria for chronic pain syndrome. Dr. Bieri acknowledged that some of the elements of chronic pain syndrome existed before the 1997 injury but stated that the 1997 injury did aggravate it. Dr. Bieri also diagnosed chronic lumbar sprain, compression fracture of the T8 level, and elements of lower extremity radiculopathy. He rated the total impairment as 17 percent, using the 4th Edition of the AMA *Guides to the Evaluation of Permanent Impairment*.

Dr. Bieri recommended claimant be limited to lifting no more than 15 pounds, limit frequent lifting to 5 pounds, and negligible constant lifting. Dr. Bieri also testified that it was reasonable that claimant's work be limited to five hours per day. He further testified, however, that his restrictions were to sedentary-light level of work which could include working eight hours per day. He later testified that the five-hour restrictions would be his restriction.

Dr. Bieri says claimant cannot do 3 of 91 tasks.

Dr. Bieri testified that the FCE is only one tool used to determine the appropriate restrictions. He was aware of the FCE results when he evaluated claimant's condition and made his recommendations.

12. Claimant has returned to work for respondent but works only 20 hours per week. In Docket No. 222,498, the parties stipulated to both a preinjury wage of $423.26 and a postinjury wage of $262.47 for a wage loss of 38 percent.

13. The Board finds that claimant has proven she suffered additional permanent impairment from the February 1997 accident. Respondent argues that if claimant has chronic pain syndrome, she had it before the 1997 accident. In support of this argument, respondent reviews testimony regarding the criteria for diagnosis of chronic pain syndrome listed in the AMA *Guides to the Evaluation of Permanent Impairment*. Respondent identifies evidence that claimant's complaints and other circumstances satisfied many of these criteria before February 1997. The Board acknowledges the evidence supports the conclusion that claimant demonstrated several of those elements before the 1997 accident. But the Board also concludes, based on claimant's testimony and in part on the opinions of Dr. Bieri, that the 1997 accident caused additional impairment.

Conclusions of Law

1. Claimant has the burden of proving her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. In Docket No. 189,199, claimant has proven she is entitled to benefits for a 3 percent disability based on functional impairment.

3. The Board finds that in Docket No. 222,498, claimant has proven that she is entitled to an award of work disability. The evidences shows that her treating physician has restricted her to five hours per day and, as a result, she is not earning 90 percent of her preinjury wage. The Board concludes that by continuing to work for respondent, claimant has demonstrated good faith in obtaining and/or retaining work after her injury. As a result, she is entitled to use the actual wage loss of 38 percent in the calculation of work disability. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. The Board concludes claimant has a 3 percent task loss. This conclusion is based on the opinion of Dr. Bieri from the task list prepared by Mr. Jerry D. Hardin

Claimant has argued for a 38 percent task loss based on the restriction of five hours per day. Claimant contends this equates to a ⅜ task loss. The Board concludes, however, that a time restriction does not necessarily equate to a task loss. It does not represent task loss where, as here, the time restriction does not prevent claimant from performing any particular task or tasks. The time restriction does, of course, impact the work disability in the wage loss.

6. Claimant has a 20.5 percent work disability based on a 3 percent task loss and a 38 percent wage loss. K.S.A. 44-510e.

7. The award should be reduced by the 3 percent preexisting functional impairment. K.S.A. 44-501(c). As a result, in Docket No. 222,498, claimant is entitled to benefits based on a 17.5 percent permanent partial disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Awards entered by Administrative Law Judge Bruce E. Moore on January 6, 2000, in Docket No. 189,199 and Docket No. 222,498, should be, and the same are hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Wichita, KS
Richard L. Friedeman, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director